Town Concrete Pipe of Washington, Inc., Employer-Petitioner *and* Laborers International Union of North America, Local No. 252, AFL-CIO. Case 19-RM-1656

January 8, 1982

DECISION AND DIRECTION

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Acting Regional Director for Region 19 on January 20, 1981, an election by secret ballot was conducted in the above-entitled matter on April 16, 1981, among the employees in the following appropriate collective-bargaining unit:

> All production and maintenance employees (including employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements) employed at 4601 S. Orchard, Tacoma, Washington; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

The tally of ballots showed that, of approximately 94 eligible voters, 23 cast ballots for and 38 cast ballots against the Union. There were 33 challenged ballots which were sufficient to affect the results of the election.

On May 1, 1981, following an investigation, the Acting Regional Director issued a Report on Challenged Ballots and Direction and Notice of Hearing.

Pursuant to the notice, a hearing on challenged ballots was held in Tacoma, Washington, on May 12, 13, 26, and 27 and June 4, 8, 10, and 11, 1981, before Hearing Officer Catherine M. Roth, in which the Employer and the Union participated. The parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues herein.

On July 31, 1981, the Hearing Officer issued her report in which she concluded that the challenges to 27 ballots should be overruled and the challenges to 6 ballots should be sustained.[1] She recommended that the overruled challenged ballots be opened and counted and a revised tally of ballots issued. Thereafter, the Employer filed timely exceptions and a supporting brief, and the Union filed an answering brief to the Employer's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

The Board has reviewed the record in light of the exceptions [2] and briefs and hereby adopts the Hearing Officer's findings and recommendations,[3] as modified herein.[4]

We agree with the Hearing Officer's recommendation to overrule the challenges to 27 ballots, and to sustain the challenges to 4 ballots. However, for the following reasons, we disagree with her recommendations that the challenges to the ballots of Roland Prouty and Robin Urich be sustained.

1. The Hearing Officer concluded that, as of the date of the election, Prouty was a temporary employee and thus ineligible to vote. She found that

[1] Specifically she recommended that challenges to the ballots of the following voters be overruled: Raymond R. Bame, Edward Combs, Richard L. Crocenzi, David C. Ell, Duane M. Felix, Robert W. Halsey, Douglas Hite, Mark D. Hite, Ralph Johnson, Joseph H. Kistler, Chris A. Markum, John H. McVey, Russell Morrison, Aaron Olson, Horace Olson, Gary Lee Parkos, Stuart J. Schreiner, John E. Sears, Mario S. Serka, Allen H. Stevens, Floyd Thompson, Timothy B. Wegner, Ken Wolever, Ted Wilson, Robert Creger, Leroy Henke, and Ron Owens. She recommended that challenges to the ballots of the following voters be sustained: Brian Cameron, Walter Davis, Eric Rehwaldt, Roland Prouty, Robin Urich, and James L. Sullens.

[2] In the absence of exceptions thereto, we adopt, *pro forma*, the recommendation of the Hearing Officer to sustain the challenges to the ballots of Brian Cameron, Walter Davis, Eric Rehwaldt, and James L. Sullens, and to overrule the challenges to the ballots of Robert Creger, Leroy Henke, and Ron Owens.

In its brief in support of its exceptions to the Hearing Officer's report and recommendations, the Employer noted that, during the hearing, the Employer withdrew its challenge to the ballot of Edward Combs and, in its brief to the Hearing Officer, it withdrew its challenges to the ballots of David C. Ell, Robert W. Halsey, Ralph Johnson, Chris A. Markum, Russell Morrison, Horace Olson, and Allan H. Stevens. The above-named voters were all employed at Tacoma Boat at the time of the hearing. However, elsewhere in this brief, the Employer excepted to the Hearing Officer's recommendations to overrule the challenges to the ballots of these voters. Additionally, in its motion to reopen the record, the Employer requested that it be permitted to revoke its withdrawal of its challenge to Ell's ballot. We find that, even if the Employer intended to preserve its challenges to the ballots of these voters, the challenges should be overruled for the reasons stated by the Hearing Officer in her analysis with respect to the other strikers who subsequently were employed at Tacoma Boat.

[3] The Employer has excepted to certain credibility findings made by the Hearing Officer. It is the established policy of the Board not to overrule a Hearing Officer's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing her findings.

[4] On August 24, 1981, the Employer filed with the Board a motion to reopen the record. The Union opposed the motion. the Employer seeks to introduce evidence that, during July and August 1981, the Employer offered reinstatement to several former strikers and that these offers were refused. However, the voting eligibility of these individuals hinges upon whether they had abandoned employment with the Employer as of the election date. See *Pacific Tile and Porcelain Company*, 137 NLRB 1358 (1962). The Employer's allegations involve post-election conduct and, even if true, are not relevant to our determination. Accordingly, we deny the Employer's motion.

Prouty was on layoff status with his former employer, Southwest Deliveries, and that he maintained a home in Vancouver, Washington, 135 miles from the Employer's facilities.[5] She further found that, at a February 28, 1981, union meeting, Prouty told two union business agents that he was employed at Town Concrete Pipe on a temporary basis. The Hearing Officer concluded that Prouty intended to stay at his job with the Employer only until he was recalled by Southwest Deliveries.

The Employer excepts to this conclusion, contending that Prouty was hired as a permanent employee, and remained as such at the time of the election. We believe that the weight of the record evidence supports the Employer's contention.

Orville McKenzie, a mechanic with the Employer who became incapacitated by a back ailment, recommended Prouty as his replacement. Pursuant to this recommendation, Plant Superintendent Dan Columbini hired Prouty on November 25, 1980. Both Columbini and Prouty testified that there was no mention at the hiring interview that the job would be temporary. Columbini stated, "[I]t was understood when he was hired that he was a full-time employee."[6]

Prouty had been laid off at Southwest Deliveries due to a lack of available work on February 5, 1980, more than 9 months before he commenced employment with the Employer. James Barnes, the general manager of Southwest Deliveries, testified that Prouty was technically eligible for recall for 3 years after being laid off. However, he also stated that Prouty's reemployment was extremely unlikely, and that Prouty was never given any indication that he would be recalled.[7] Under these circumstances, we find that while Prouty was working for the Employer he did not have a reasonable expectation of returning to Southwest Deliveries.

We do not attribute considerable significance to Prouty's statement at the union meeting that he was only a temporary employee. Prouty may have hoped that he would soon obtain a job at Southwest Deliveries or elsewhere, but there is no evidence that he reasonably expected to leave at anytime soon.

Considering all of the relevant evidence, we find that the Petitioner has not demonstrated that Prouty was a temporary employee. Accordingly, we overrule the challenge to his ballot.

2. Urich resigned his position as a machine operator with the Employer on April 7, 1981, 9 days before the election. Company Vice President Raymond Davis telephoned him the following day to ask why he quit, and Urich replied that he did not like his supervisor and disapproved of the way the plant was run.[8] On April 9, Urich met with Davis and Columbini at the company offices and admitted that he actually quit because he had severe problems with drugs and alcohol, and he believed that he was "falling apart." Upon his assurance that he would seek professional help for his problems, the Employer changed Urich's status from voluntary quit and granted him a medical leave of absence. Urich remained out of work until April 20, 1981.

The Hearing Officer found that Urich was not a bona fide employee at the time of the election, but was rehired by the Employer in an effort to "flood" the unit with antiunion employees. She emphasized that Urich was an outspoken opponent of the Union's organizing drive and served as a company observer at the election. The Hearing Officer also indicated that Urich had received disciplinary warnings from the Employer, and observed that another employee who had also quit was not asked to return because he had disciplinary problems. In addition, the Hearing Officer found that Urich was rehired although he did not get professional help as he had promised.

We disagree with the Hearing Officer and find that Urich was an eligible voter. Urich had been employed by the Employer since July 1977. Although he received several warnings for absenteeism,[9] he was not considered to be a serious disciplinary problem, and there is no evidence that he was not a competent employee.

Additionally, we find that the Employer's treatment of Urich was consistent with its past practice. The record indicates that, during the past few years, the Employer contacted several other employees who had quit and asked them to return. With respect to the individual referred to by the Hearing Officer who was not requested to return, Columbini testified that his disciplinary problems were such that the company management was of the opinion that he was "not salvageable."

Urich testified that, during the week that he was on leave, he applied to enter a free clinic but was not accepted. He told Columbini that he intended to seek private counseling, but he needed to work in order to pay for it. He also stated that he had not had any drugs or alcohol for a week. Columbini believed that Urich was making a serious effort to obtain professional help to get well and therefore permitted him to return to work.

[5] Prouty commuted to Vancouver each weekend.

[6] The record indicates that Columbini granted Prouty's request for a 2-week probationary period, after which he would be paid at his full salary. The Employer generally required a 90-day probationary period.

[7] The Hearing Officer fully credited Barnes' testimony.

[8] Davis testified that it is his policy to speak to employees who quit and to ascertain the reasons why.

[9] His unexplained absences apparently resulted from his problems with alcohol.

We note that the Employer granted medical leave from December 24, 1980, until March 2, 1981, to another employee whose ballot was challenged because he was hospitalized due to severe psychological problems. In recommending that we overrule the challenge to that ballot,[10] the Hearing Officer stated, inter alia, that "there is a presumption that an employee granted a leave of absence is still an employee." She further indicated that "[t]he only evidence presented by the Union to show that the Employer was packing the unit was the placement of two employees on medical leave and the Employer's alleged failure to give special consideration to a union adherent."[11] We find that these considerations support our conclusion that the Employer granted medical leave to and rehired Urich for legitimate reasons.

The evidence herein does not demonstrate that the Employer rehired Urich as part of a scheme to pack the unit. In contrast to the Hearing Officer, we do not find it extraordinary that the Employer contacted a longstanding employee such as Urich to find out why he quit, and offered him an opportunity to return to work. Accordingly, we overrule the challenge to his ballot.

DIRECTION

The Regional Director is hereby directed to open and count the ballots of Raymond R. Bame, Edward Combs, Richard L. Crocenzi, David C. Ell, Duane M. Felix, Robert W. Halsey, Douglas Hite, Mark D. Hite, Ralph Johnson, Joseph H. Kistler, Chris A. Markum, John H. McVey, Russell Morrison, Aaron Olson, Horace Olson, Gary Lee Parkos, Stuart J. Schreiner, John E. Sears, Mario S. Serka, Allen H. Stevens, Floyd Thompson, Timothy B. Wegner, Ken Wolever, Ted Wilson, Robert Creger, Leroy Henke, Ron Owens, Roland Prouty, and Robin Urich, and thereafter prepare and cause to be served on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

[10] There was no exception to this recommendation and we adopted it, *pro forma*, in fn. 2, *supra*.

[11] The facts with respect to this individual are not relevant herein.